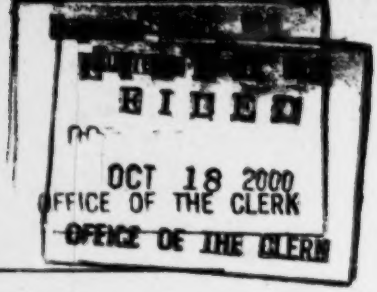

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No. 99-1995

IN THE

Supreme Court of the United States

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,

Petitioners,

v.

WASTE CONTROL SPECIALISTS, LLC,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, and Frank C. Thorley incorporate herein by reference their Corporate Disclosure Statement set forth in their Petition for Certiorari.

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REPLY TO BRIEF IN OPPOSITION

Envirocare of Texas, Inc. *et al.* ("Envirocare") demonstrated that their petition for certiorari should be granted to resolve important questions concerning the operation of the federal statute governing removal of cases from state to federal courts. Further, certiorari is appropriate because of various splits in authority among the lower federal courts on these recurring issues.

In its opposition to the petition, respondent Waste Control Specialists, LLC ("WCS") claims that two jurisdictional issues preclude the Court from reaching the questions presented by the petition. The purported jurisdictional issues are illusive and this Court needs to definitively resolve the existing split of authority between various circuits and district courts.

I. THE JURISDICTIONAL BARRIERS ARE ILLUSORY.

A. The 30-day rule is not a barrier to review.

WCS asserts first that the 30-day rule for removing a case from state to federal court, 28 U.S.C. § 1446(b), prevents this Court from addressing the questions presented in the petition for certiorari (Br. in Opp. 6-10). The 30-day rule creates no such barrier.

The factual question of how many days it took Envirocare to seek removal is completely irrelevant to the issue of whether to grant certiorari unless the resolution of that question might strip the Court of jurisdiction. Recognizing this point, WCS claims that the 30-day rule is jurisdictional (Br. in Opp. 6-8). This Court has held otherwise in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92 (1898), stating directly that "the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is . . . but modal and formal." *Id.* at 98 (internal quotation omitted). WCS dismisses this holding on the ground that it involved the predecessor statute to section 1446(b), which, WCS asserts, "did not contain a specified time period for filing a notice of removal" (Br. in Opp. 6). This is

simply untrue. The removal statute in *Powers* contained a specified time limit – a limit determined by reference to state law. *See Powers*, 169 U.S. at 100.

Powers remains good law today, and the various courts of appeals have concluded – uniformly – that section 1446(b)'s time limits are not jurisdictional. WCS concedes, in a footnote, that "some lower federal courts" have found section 1446(b) to lack jurisdictional consequences (Br. in Opp. 8 n.4). In fact, the uniformity in the decisions is far more impressive than WCS' brief reveals, encompassing more than a dozen court of appeals decisions in a number of different circuits.[1] WCS does not, and cannot, cite a single case holding that the 30-day rule has any sort of jurisdictional implications.[2]

Even if the 30-day rule somehow has jurisdictional implications, the district court carefully considered the issue and found that Envirocare fully complied with the rule (Pet. App. 56a-57a). The district court's finding was not disturbed by the Fifth Circuit and, at this juncture in the proceedings, is the law of the case. This Court generally will not revisit such findings. *See Arizona v. California*, 460 U.S. 605, 618-22 (1983). Indeed, the Court will undertake to revisit another court's

---

[1] *See, e.g., In re Untroyal Goodrich Tire Co.*, 104 F.3d 322, 324 (11th Cir. 1997); *Seaton v. Jabe*, 992 F.2d 79, 81 (6th Cir.1993); *Maniary v. FDIC*, 979 F.2d 782, 784-85 (9th Cir. 1992); *Louisiana v. Sparks*, 978 F.2d 226, 233 (5th Cir. 1992); *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1046 (2d Cir.1991); *Nolan v. Boeing*, 919 F.2d 1058, 1063 n.6 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991); *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985); *McLeod v. Cities Service Gas Co.*, 233 F.2d 242, 244 (10th Cir. 1956).

[2] Unable to find even a single holding agreeing with its position, WCS asserts that one *dissenting* Court opinion "referred" to section 1446(b) as a "jurisdictional statute" (Br. in Opp. 8). This is a misleading assertion derived from a truncated quotation. The dissent only stated that the majority opinion had departed "from this Court's practice of strictly construing removal and similar jurisdictional statutes." *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C.J., dissenting).

holding only if convinced "that it is clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8. These conditions do not pertain here, as the district court's conclusion is fully supported by the facts.

Section 1446(b) requires that the notice of removal be filed within 30 days of the filing of the pleading "from which it may first be *ascertained* that the case is one which is or has become removable... ." 28 U.S.C. §1446(b) (emphasis added). Envirocare ascertained the basis for removal of this case when it received WCS' amended complaint. WCS' original complaint alleged that Envirocare had acted improperly in "the private-sector market for disposal of mixed wastes and . . . disposal of low-level radioactive wastes." Plaintiff's Orig. Pet. at ¶¶87-89, *quoted in* Pet. App. 57a. After several months, WCS significantly amended its original complaint to allege improper action in a narrower market, specifically the "private disposal market for *DOE's* [that is, United States Department of Energy's] mixed wastes. . . [and] for *DOE's* low-level radioactive wastes." Plaintiff's First Amended Pet. at ¶¶91, 96 (emphases added), *quoted in* Pet. App. 57a. These amendments significantly changed the character of the complaint, making it clear – for the first time – that WCS' action sought damages *solely* for services purchased by the United States government. It was only at this point that Envirocare could clearly "ascertain" the basis for removal. Envirocare promptly filed for removal within 30 days of the filing of the amended complaint (Pet. App. 56a). The amended complaint's change in the market – from disposing low-level waste to disposing Department of Energy waste *only* – redirected the case to actions involving the economic interests solely of a federal government agency and created a basis for removal.

B. Section 1447(d) does not strip the Supreme Court of authority to review decisions of the courts of appeals.

WCS also argues that this Court has been stripped of any jurisdiction to review the Fifth Circuit's decision by 28 U.S.C. § 1447(d), which provides: "An order remanding a case to the

State court from which it was removed is not reviewable on appeal or otherwise . . . ." This petition seeks review not of a district court order remanding a case to the State court, but rather of a substantive final judgment of the Court of Appeals which included an instruction to the district court to remand. The district court here did in fact *later* order that the case be sent back to state court. But Envirocare seeks review not of that order, but of the substantive decision of the Fifth Circuit. Section 1447(d) simply does not apply to its petition for certiorari.

Two decisions of this Court hold – unanimously – that section 1447(d)'s predecessor statute did not block Court review of decisions by the Court of Appeals returning removed cases to the district courts with instructions to remand to state court. *See Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947); *Gay v. Ruff*, 292 U.S. 25, 30-31 (1934). WCS contends that these controlling decisions should be disregarded because they arose under the predecessor statute. WCS claims: "[I]n 1948, however, immediately after *Aetna* summarily reaffirmed the holding of *Gay*, Congress enacted the broad language of section 1447(d)," which in WCS's view blocks review here. Br. in Opp. 11.

WCS' description of the congressional enactment of section 1447(d) is erroneous. It is true that in 1948, "immediately after *Aetna*," Congress modified the federal removal statute as part of the comprehensive redrafting of all the judicial procedures contained in title 28. Contrary to WCS' representation, Congress did *not* enact section 1447(d) in 1948. In fact, in that year Congress enacted section 1447 without any provision blocking appellate review of remand orders. 62 Stat. 939, *see* U.S. Code Cong. Serv., 80th Cong., 2d Sess. 1858-59 (1948). It was in the following year, 1949, that Congress passed corrective legislation to fix technical problems detected in the massive revisions to title 28. As both the Senate and House Reports to the 1949 Act explain, Congress desired to "correct[] typographical and other minor errors, and clarif[y] the language of some sections to conform more closely to the original law, or

to remove ambiguities have been discovered." S. Rep. No. 303, 81st Cong., 1st sess., *reprinted in* 1949 U.S. Code Cong. Serv. 1248; H. Rep. No. 352, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. Serv. 1254. Congress enacted section 1447(d) as part of this 1949 corrective legislation, 63 Stat. 102, not as part of the 1948 revisions to the Judiciary Act, strongly suggesting that differences between section 1447(d) and its predecessor version were not substantive.

The legislative history indicates specifically that Congress' purpose in enacting section 1447(d) was "to remove any doubt that the *former law* as to the finality of an order of remand to a State court is *continued.*" H. Rep. No. 352, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code. Serv. 1268 (emphases added). Thus, by inaccurately claiming that section 1447(d) was enacted in 1948 "immediately" after *Aetna*, WCS misleadingly creates the impression that the subsection was designed to overrule former law. In fact Congress' express purpose was to "continue" the "former law" as to finality – that obviously included *Aetna* and *Gay,* holding that this Court has authority to review remand decisions by the court of appeals.

This legislative history simply confirms what common sense indicates, as there is no reason to conclude that Congress intended to strip this Court of its authority to review court of appeals decisions in this particular area. It is one thing for Congress to declare that if the removal issue can be quickly and immediately resolved by the trial court, appellate review is not permitted. It would be quite another thing for Congress to decide that final *appellate* authority on the law in this area resides not in this Court but in the various courts of appeals around the country. *See Gay*, 292 U.S. at 30-31; *see also Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 76 (1996) (noting Congress established a "procedure calling for expeditious superintendence [of removal issues] *by district courts*" and precluding review of "*district court* orders remanding cases to state courts" but that "Congress did not similarly exclude appellate review of refusals to remand" (emphases added)). Such a drastic restructuring of the normal appellate process

should not be casually imputed to Congress. *See Felker v. Turpin*, 518 U.S. 651, 661 (1996) (refusing to find repeal by implication of Supreme Court authority).[3]

II. THE PETITION PRESENTS IMPORTANT AND RECURRING QUESTIONS ABOUT REMOVAL

When it finally addresses the merits of the petition, WCS mischaracterizes what the Fifth Circuit held. This allows WCS to demolish a series of strawmen, rather than deny the importance of the issues raised by the petition. When fully understood, the Fifth Circuit's decision raises several crucial questions about the operation of the federal removal statute. The importance of these questions cries out for further review in this Court for the reasons explained in Envirocare's petition for certiorari.

A. It is necessary to resolve whether preemption is the only basis for "artful pleading" removal.

The Fifth Circuit's decision below concludes that removal on "artful pleading" grounds can never be proper unless the case involves complete federal preemption of state law. The petition expounds on why this conclusion rests on a misinterpretation of this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998). The petition further explains that courts and commentators have reached different interpretations of *Rivet* and, more generally, the scope of "artful pleading" removal (Cert. Pet. 13-18).

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[3] WCS enlists a red herring in its effort to deflect this Court from the merits of the petition, claiming that a stay of state proceedings could not be entered. (Br. in Opp. 10). If this Court decides to review the case, the Texas court will undoubtedly stay the proceedings by motion or on its own accord to permit this Court to review the issues in an orderly fashion. In the highly unlikely event that the Texas court will not grant a stay, this Court can enjoin a state proceeding "where necessary in aid of its jurisdiction." 28 U.S.C. § 2283.

In response, WCS claims that the Fifth Circuit did not conclude that complete preemption is the only basis for artful pleading removal. WCS baldly asserts that "the court below did not opine or suggest that a state law claim which embodies a 'substantial-federal-question' could not be removed . . . ." (Br. in Opp. 13). From this initial premise, WCS goes on to argue that certiorari is inappropriate (Br. in Opp. 13-23).

WCS simply ignores what the Fifth Circuit actually said: "Without complete preemption, the artful pleading doctrine does not apply" (Pet. App. 4a). It is hard to understand how WCS can construe this statement as meaning anything other than what it says – that without the required "complete preemption," the artful pleading doctrine simply *"does not apply."*

Even if there were some ambiguity, the Fifth Circuit continues in the next three sentences of its opinion to quote from and examine the passage in this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998), which discusses complete preemption – and only complete preemption – as basis for removal. As explained at greater length in Envirocare's petition (Cert. Pet. 14-16), this is the very passage that noted commentators have concluded "may have given indirect credence to the assertion that the artful-pleading doctrine extends only to the complete preemption context." 14B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* section 3722 at 445 (quoting the same passage in *Rivet*, 522 U.S. at 475, as quoted by the Fifth Circuit); *see also* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1825-26 (1998) (quoting the same passage in *Rivet*, noting that it might be viewed as subsuming other grounds for artful-pleading removal, and arguing that this is not a proper interpretation).

District courts in the Fifth Circuit are already reading the decision below as eliminating other forms of artful pleading removal. In *Greer v. Majr Financial Corp.*, 105 F.Supp.2d 583

(S.D. Miss. 2000),[4] the district court first rejected complete preemption as the basis for removal. *Id.* at 588-91. The court then turned to the possibility of removal on the alternative basis of a "substantial federal question." Unlike WCS' artful recharacterization of the decision below, the district court found differently.

> In *Waste Control Specialists*, the Fifth Circuit declared that "[w]ithout complete preemption, the artful pleading doctrine does not apply," *id.* at 783, and thus confirmed (or clarified) that the practice of a removal court's seeking to determine whether the real nature of a claim is federal, regardless of the plaintiff's characterization, is correctly *confined* . . . to areas of the law preempted by federal substantive law.

Greer, 105 F.Supp.2d at 592 (emphasis added) (internal citation omitted). That court also noted the Fifth Circuit's new approach was a departure from previous cases. *Id.* at 592-93 n.7. Finally, the district court observed – as Envirocare observed in its petition for certiorari (Cert. Pet. 15) – that the approach of the Fifth Circuit below differed from "a number of other courts and at least one leading commentator" who have "treated artful pleading and complete preemption as separate bases for removal, or at least had not treated the 'artful pleading' doctrine as necessarily limited to cases of complete preemption." *Id.* at 593 n.7 (*citing* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex L. Rev. 1781 (1998)).

Since the Fifth Circuit's decision did not leave room for other forms of artful pleading removal, it conflicts with various other circuits allowing removal on grounds other than complete preemption (Cert. Pet. 17 n.3), causing confusion in the lower courts as to the meaning of *Rivet* (Cert. Pet. 14-16).[5]

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[4] This case was decided ten days *after* Envirocare's petition for certiorari.

[5] *In re State of Texas*, 110 F.Supp.2d 514, 525 (E.D. Tex. 2000) ("the artful pleading doctrine applies only in cases where federal law completely preempts plaintiff's state-law cause of action"; *citing* decision

B. Certiorari is necessary to resolve a split in the circuits over application of *Caterpillar, Inc. v. Lewis.*

Envirocare's petition explains how the Fifth Circuit's decision conflicts with *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) (Cert. Pet. 18-28). In *Caterpillar*, despite improper removal initially, the trial court had federal jurisdiction at the time of trial and judgment. This Court concluded that, "[t]o wipe out the adjudication post judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77. This Court stated: "[w]e hold that a District Court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id. at 64*. Here, the Fifth Circuit held that, despite the existence of federal jurisdiction at the time of judgment, *Caterpillar* was inapplicable and that the district court adjudication should be voided (Pet. App. 10a). Because the district court here dismissed the case under Rule 12(b)(6) rather than Rule 56, the Fifth Circuit found consideration of judicial economy inapplicable and vacated the district court's ruling (Pet. App. 10a-11a).

The Fifth Circuit's rule is nonsensical and illustrates the need for clarifying the application of *Caterpillar*. The district court could have granted summary judgment (under Rule 56) rather than a dismissal for failure to state claim (under Rule 12(b)(6)). The fact that the district court chose to dismiss under an even *more* demanding standard should not control whether its decision should be vacated.

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below). WCS also asserts that Envirocare did not press below the possibility of other kinds of artful pleading removal besides complete preemption (Br. in Opp. at 16). This is untrue. Envirocare's brief to the Fifth Circuit developed the argument at length. *See* Brief for Appellees at 18-19, *Waste Control Specialists v. Envirocare*, 199 F.3d 781 (5th Cir. 2000) (No. 98-50952).

WCS chooses not to defend the Fifth Circuit's illogical distinction between a summary judgment and a dismissal for failure to state a claim, but instead argues that the Fifth Circuit did not adopt a per se rule (Br. in Opp. 28). Here again, WCS' position is refuted by the language in the Fifth Circuit's opinion: "Though the reach of the expression 'trial on the merits' is unclear in this context, we hold that it stops short of a Rule 12(b)(6) dismissal" (Pet. App. 10a).

The split in the circuit courts is clearly revealed, however, by comparing the decision below with *Parrino v. FHP, Inc.*, 146 F.3d 699 (9th Cir. 1998). There, the Ninth Circuit refused to overturn a Rule 12(b)(6) dismissal on facts substantively indistinguishable from this case. The Ninth Circuit read *Caterpillar* as holding that "a procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court." *Id.* at 703. As demonstrated by this split in authority and the other conflicting cases cited in our petition (Cert. Pet. 22), this Court needs to provide further guidance on the practical scope and application of *Caterpillar*. *See generally* 14B Wright, Miller & Cooper, *Federal Practice and Procedure* section 3723, at 588 (noting the "somewhat more contentious and as yet undefined doctrine" of *Caterpillar*).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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